Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALMA ROMERO
Petitioner,

v.

JOSEPH LOPEZ AND THE CITY OF SAN DIEGO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

While Petitioner ALMA ROMERO's car was standing in a red zone so she could load luggage into it, Respondent, San Diego Police Officer JOSEPH LOPEZ, told Petitioner not to move her car so that he could issue a parking citation, which under California law is subject to only a civil penalty. When Petitioner tried to move her car into a loading zone, she was arrested for violating California Penal Code § 148, which criminally punishes any person who "wilfully resists, delays or obstructs any public officer . . . in the discharge or attempt to discharge any duty."

This Court is asked to decide the following:

1. Whether the Fourth Amendment prohibits the detention or seizure of an automobile (and, as a result, the driver) by a police officer for purposes of gathering information necessary to execute civil process in the form of a non-criminal parking, as opposed to a traffic, citation.

2. If not, whether the Fourth Amendment prohibits the criminal prosecution of a citizen who attempts to move a vehicle under such circumstances.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ALMA ROMERO (hereinafter Petitioner), respectfully prays that a Writ of Certiorari issue to review the Judgment and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on February 14, 2000.

OPINION(S) BELOW

On February 14, 2000, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment entered by the district court following a jury trial. A copy of this decision is attached as Appendix A-1 through A-4 (hereinafter referenced as A-1 through A-8.)

On November 24, 1997, Petitioner had filed a Motion for Summary Judgment raising the issue addressed herein. On February 4, 1998 the district court denied the motion. A copy of this decision is attached as Appendix A-9 through A-17.

STATEMENT OF JURISDICTION IN THIS COURT

The Memorandum Opinion of the Ninth Circuit affirming in part and reversing in part the judgment entered by the district court was entered on February 14, 2000. No Petition for Rehearing was filed, and no request to stay the mandate was filed. The mandate was spread in the district court on March 27, 2000.

Pursuant to Supreme Court Rule 13, this Petition for Writ of Certiorari is filed within ninety days of the filing of the Ninth Circuit's Memorandum Opinion.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). Petitioner maintains that the Ninth

Circuit Court of Appeals has decided an important federal question that has not been, but should be, settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Appendix hereto contains the pertinent text of the following statutory provisions:

1. California Penal Code § 148 and California Vehicle Code § 2800, which formed the purported legal justification for Petitioner's arrest.
2. California Penal Code § 836, which authorized Respondent LOPEZ to arrest Petitioner.
3. Division 17, Chapter 1, Article 3 of the California Vehicle Code, beginning at § 40200 through and including § 40230, sets forth the exclusive means by which violations of non-misdemeanor parking regulations enacted by municipalities in the State of California are to be enforced and adjudicated.
4. California Vehicle Code and San Diego Municipal Code sections relating to parking enforcement and the collection and distribution of proceeds from the enforcement

of parking violations.

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

1. District Court

On May 19, 1997, Petitioner filed a Complaint for Damages in the U.S. District Court for the Southern District of California. The complaint alleged causes of action for civil rights violations arising under 42 U.S.C. § 1983 and state law based causes of action. The gravamen of the complaint was false arrest and excessive force. The district court had original jurisdiction pursuant to 28 U.S.C. §1331, § 1343(4), 1367 and 42 U.S.C. § 1983. An Answer was filed on May 10, 1997.

On November 24, 1997, Petitioner moved for summary judgment on her false arrest claim(s), asserting that since no crime was committed, neither she nor her car could be seized or detained. Since her conduct was constitutionally privileged, Respondent LOPEZ could not lawfully arrest her for a violation of § 148 (or Vehicle Code § 2800). F.R.C.P. 56(c).

Neither the district court nor Respondents specifically addressed this issue. Rather, Respondent's opposition to the motion centered on their assertion that Respondent LOPEZ did not arrest Petitioner for parking in a red zone, but rather that he had probable cause to arrest Petitioner under California Penal Code § 148 in that she allegedly ignored his direction not to move her car while he was preparing to issue her a parking ticket for standing in a

red zone.[1] Respondents admitted Petitioner was free to leave[2], but until Respondent LOPEZ issued a parking citation, she could not move or take her car. (See A-12 through A-20)

Petitioner replied that any facts regarding the incident raised by Respondents, including whether or not Petitioner was "backing in the wrong direction on a one way street, raised her voice, grabbed her steering wheel, or resisted efforts to be pulled from the car" were irrelevant to the issue.[3]

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[1] At the summary judgment stage, Respondents asserted Petitioner was also subject to arrest for violating Vehicle Code § 2800, which makes it unlawful to "wilfully fail or refuse to comply with any lawful order, signal, or direction of any peace officer . . . when that peace officer is in uniform and is performing duties under any of the provisions of this code, or to refuse to submit to any lawful inspection under this code."

Petitioner agrees that she would have been subject to arrest if the order not to move her car was lawful, which is the subject of the instant Petition.

[2] Petitioner was clearly seized when Respondent LOPEZ opened her door and grabbed her arms in order to take her into custody for violating § 148. California v. Hodari D., 499 U.S. 621 (1991)(application of physical force constitutes seizure).

[3] See Katz v. United States, 194 F.3d 962 (9th Cir. 1999)("appellate court has jurisdiction to consider assertion that disputed issue of fact is not material.")

On February 4, 1998 the district court issued a written ruling denying the motion. It found a disputed issue of material fact lie in whether "Petitioner heard his (Respondent LOPEZ's) command to stop the car and exit the vehicle, that she acknowledged him and refused to comply . . . (and) physically resisted his subsequent arrest." See A -9.[4]

On the eve of trial, the district court dismissed the 42 U.S.C. § 1983 based false arrest claims pursuant to Heck v. Humphrey, 512 U.S. 477 (1994) due to Petitioner's plea to disturbing the peace in violation of California Penal Code § 415(1), an infraction. Sua sponte, the district court also dismissed the state law based false arrest claim..

On April 14, 1998, a jury was empaneled to hear Petitioner's excessive force claims. Petitioner moved for judgment as a matter of law on her false arrest claims under F.R.C.P. 50, but the motion was denied without comment.[5] On April 22, 1997, the jury found for Respondents. Judgment was entered in the district court on May 6, 1998.

2. Court of Appeals

Jurisdiction in the Court of Appeals was invoked

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[4] Petitioner believes these facts were immaterial to the issue of whether Respondent LOPEZ had the constitutional authority to command Petitioner not to move the car.

Moreover, contrary to the district court's ruling, neither party contended that Petitioner was arrested for "physically resisting her subsequent arrest."

[5] For some reason, this motion, heard at sidebar, was not recorded.

under F.R.C.P. 54 and 58, and 28 U.S.C. § 1291 and § 1294(1). The Notice of Appeal was timely filed on May 8, 1998. Fed. R. App. P. 4(a).

Petitioner asserted because Respondent LOPEZ had no probable cause to believe that her car was evidence of a crime or contained evidence of a crime, he could not lawfully detain it for purposes of issuing a non-criminal parking citation under California Vehicle Code § 40202.

On February 14, 2000, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment entered by the district court following a jury trial. Specifically, it ordered the reinstatement of the state law based false arrest claim. It affirmed the denial of the motion for summary judgment, finding that Petitioner had failed to demonstrate that her arrest was illegal as a matter of law. Specifically, the Ninth Circuit ruled that Petitioner failed to establish a "right to flee the scene with her vehicle under Vehicle Code § 40202." As such, she could not assert that her conduct in moving the car was privileged under the Fourth Amendment. (see A-3)

Pursuant to the instructions of the Court of Appeals, the district court exercised its discretion under 28 U.S.C. § 1367(c)(3) and determined it would not retain jurisdiction of the only surviving cause of action, a state law based cause of action for false arrest, and dismissed the case without prejudice to refiling in the Superior Court. The action was refiled in the California Superior Court for the County of San Diego on April 11, 2000. No trial date has yet been set.[6] Hence, this petition is ripe for review.

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[6] If this petition is granted, Petitioner will seek a stay of any further proceedings in the Superior Court.

B. Statement of Facts

Petitioner submits that although the legality of her arrest was never decided by a jury, this Court may properly decide the matter on the basis of the following undisputed facts[7] presented to the district court at the summary judgment stage of the proceedings:

1. On December 3, 1996, Petitioner and her mother returned to San Diego from a trip to Brazil. Petitioner, a sales manager then employed by the Westin Hotel (formerly the Doubletree) located at 910 Broadway Circle, had parked her car in the Westin's garage and she and her mother took a taxi to and from the airport. See A-25.

2. Once the taxi dropped them off in front of the U.S. Post Office located next to the hotel, she left her mother and a large amount of luggage on the sidewalk. She retrieved her car, parking it (with the keys in the ignition) in the exact same spot where the taxi had pulled over to drop them off. She opened the trunk, got out of the car and began loading the luggage into the trunk. See A-25 through 26.

3. Petitioner's car was parked in a red "no parking" zone. See A-26.

6. She had difficulty backing up because a white vehicle was blocking her path. This vehicle was driven by Detective Boyd. See A-28.

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[7] Referenced according to their number originally assigned to them.

7. Respondent LOPEZ pulled her from her car and arrested her for a violation of Penal Code § 148, delaying an officer. See A-28.

10. Petitioner, like any other citizen, has the right to leave while a parking citation is being issued. See A-29.

11. The information Respondent LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view. See A-29.

12. Petitioner was handcuffed by Respondent LOPEZ, who subjected her to a full custodial arrest. See A-29.

13. Respondent LOPEZ did not attempt to cite and release Petitioner in accordance with Penal Code § 853.6. See A-29.

The following facts were disputed at the summary judgment stage, however, Petitioner contends none were material to the issue of whether Respondent LOPEZ could, without violating the Fourth Amendment, order Petitioner not to move her car[8].

4. Respondent LOPEZ parked his motorcycle in front

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[8] These facts were presented to the district court in connection with another issue not before this Court, to wit, whether Respondent LOPEZ was required to "cite and release" Petitioner in accordance with Penal Code § 853.6(i).

See footnote 3.

of her car, and immediately began yelling at Petitioner that she was parked in a red zone. Petitioner apologized and said that she would finish packing her car and move the car. Respondent LOPEZ stated "that's too bad, its going to cost you $60.00. MOVE IT!!!" Petitioner then ceased loading the luggage (she was about halfway done) and, after telling her mother that she was going to move the car, attempted to move it as directed. Specifically, she wanted to back up into the hotel traffic circle, which is a passenger loading zone. See A-26 through 27.

5. While backing up her car, she drove over an item of her luggage because she was in a hurry to comply with Respondent LOPEZ's order. See A-27.

8. Petitioner had committed no other offenses which would subject her to arrest.[9] See A-28.

9. An officer issuing a parking citation need not obtain a VIN number or expiration date in every instance. See A-28 through 29.

14. The seven factors listed in Penal Code 853.6(I) did not apply to Petitioner's situation. See A-30.

15. Respondent LOPEZ never asked Petitioner for identification. See A-30.

In their opposition to Petitioner's summary judgment motion, Respondents asserted the following "Additional Material Facts":

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[9] See footnote 1.

16. Respondent LOPEZ attempted to issue a parking citation to the car Petitioner was in control of after Petitioner failed to move the car as requested by Respondent LOPEZ. Petitioner was not free to take the car until Respondent LOPEZ had gathered the information necessary to issue the car a citation. See A-31.

Whether Petitioner was free to take the car is the crux of the instant matter. Whether she initially failed to move the car, a fact she disputes[10], is not material to this legal issue.

17. Respondent LOPEZ instructed Petitioner not to move the car because he had not been able to write down any of the car's identifying information necessary for the issuance of the citation. See A-31.

The legality of Respondent LOPEZ's instructions not to move the car is, again, the determination this Court is being asked to decide. Why he instructed her is not material to this question. (but see item number 11 above)

18. Petitioner ignored Respondent LOPEZ's orders not to move the car, entered the car and began to back away from Respondent LOPEZ. Petitioner also ordered Respondent LOPEZ's order to stop and exit the car. Therefore, Respondent LOPEZ was forced to pull Petitioner from the car over her resistance and place her under custodial arrest. It was clear that Petitioner was not going to comply with Respondent LOPEZ's orders and the offense was going to

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[10] Rather, she contended she was in the process of doing so when she was arrested.

continue. Therefore, she was not given a misdemeanor citation and released. See A-31 through 32. .

Although Petitioner did in fact move the car, whether she was exercising her Fourth Amendment rights, and hence not obligated to comply with an order she asserts was unlawful, is the crux of the instant matter. The remaining facts are not material to this determination.[11]

The parties stipulated that Respondent LOPEZ was acting within the course and scope of his employment and acting under color of law when he arrested Petitioner.

C. The Fourth Amendment Prohibits the Detention or Seizure of an Automobile by a Police Officer for Purposes of Gathering Information Necessary to Execute Civil Process in the Form of a Non-criminal Parking Citation.

1. Introduction

An arrest made without an arrest warrant is presumed violative of the Fourth Amendment. The burden of proof then shifts to the State to establish that an arrest was based upon a recognized exception to the warrant requirement. Mincey v. Arizona, 437 U.S. 385, 390 (1978)

Whether an officer is authorized to make an arrest or detention ordinarily depends, in the first instance, on state law. Michigan v. DeFillippo, 443 U.S. 31, 36 (1978).

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[11] Petitioner has omitted any discussion of the details of her transportation, booking, damages, and impeachment of Respondent LOPEZ by virtue of uncorroborated statements set forth in his police report.

There are basically three different levels of police contacts with individuals: (1) consensual encounters; (2) detentions, which are seizures strictly limited in duration, scope and purpose and may be conducted upon an articulable suspicion that a person has committed or is about to commit a crime; and (3) arrests, which are seizures exceeding the permissible limits of a detention involving restraint comparable to a formal arrest and require probable cause to believe the suspect has committed a crime. Florida v. Royer, 460 U.S. 491, 498 (1983)(holding that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.'); accord Ybarra v. Illinois, 444 U.S. 85 (1979)(search warrant for tavern does not permit body searches of tavern's patrons in the absence of individualized suspicion (i.e. probable cause) to believe patrons are in possession of evidence of a crime or contraband.)

A detention is permissible if reasonable suspicion, as defined by Terry v. Ohio, 392 U.S. 1 (1968), exists to suspect criminal activity is underway.

Probable cause, as defined by Illinois v. Gates, 462 U.S. 213 (1983), requires belief that a criminal offense has been or is being committed.

Prior to 1992, Vehicle Code § 40200 provided that the driver of an illegally parked vehicle could be criminally prosecuted for an infraction. People v. Levinson 15 Cal.App.4th Supp. 15 (1993).

Vehicle Code § 40200 currently provides that any violation of any regulation that is not a misdemeanor governing the standing or parking of a vehicle under this code is subject to a civil penalty, enforcement of which shall be governed by the civil administrative procedures set forth elsewhere. The registered owner and driver, rentee, or

lessee are jointly liable for parking penalties. [12]

Pursuant to Vehicle Code § 22507, § 21458 and San Diego Municipal Code § 86.09, parking in a red zone is a civil offense subject to civil penalties and administrative enforcement. Tyler v. County of Alameda, 34 Cal.App.4th 777, 782 (1995).

A fully completed parking citation is not a jurisdictional requirement in proving a parking violation; rather, the purpose of the information requirement is to permit identification of the vehicle and sufficient information to prove that a violation has been committed. People v. Levinson, supra.

Petitioner contends that the decision of the California Legislature to decriminalize parking related offenses, thereby distinguishing them from traffic offenses, requires that the Fourth Amendment operate as a restriction on the conduct of police officers and Code Enforcement Officers [13] to detain vehicles which might be so parked, unless some other basis for seizure exists.[14]

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[12] Municipal Code § 82.07, which has not been amended to reflect the change in the Vehicle Code, does not provide for such an alternate means of giving notice to the owner.

[13] See California Penal Code § 836.5(d) and San Diego Municipal Code § 12.0105, which authorize Parking Enforcement officers to make detentions for violations of Penal Code § 148.

[14] See Vehicle Code § 22651. Respondents never presented any evidence that any of the factors specified therein would have justified the seizure of Petitioner's car.

2. Vehicles May Be "Seized" Within the Meaning of the Fourth Amendment Only If There Is Reasonable Suspicion or Probable Cause to Believe There Has Been a Violation of Traffic and Vehicle Safety Regulations or That Contraband or Evidence of a Crime May Be Found Within.

a. Traffic and Vehicle Safety Regulations

Warrantless seizures of vehicles have been permissible for over 75 years. In Carroll v. United States, 267 U.S. 132, 153 (1925), this Court established an exception to the warrant requirement for moving vehicles when it recognized:

> "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

This Court therefore held in the light of an exigency arising out of the likely disappearance of the vehicle, a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime, did not contravene the Warrant Clause of the Fourth Amendment. Id. at 158-159.

This Court subsequently extended the justification for the lack of a warrant to include the reduced expectation of privacy which flows from the "configuration, use and regulation of automobiles." Arkansas v. Sanders, 442 U.S.

753, 761 (1979)

The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653 (1979)[15]. Despite the pervasive regulation of automobiles, such seizures are scrutinized under normal Fourth Amendment probable cause principles. Whren v. United States, 517 U.S. 806, 819 (1996)("The making of a traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken "outbalances" a private interest in avoiding police contact.")

In Delaware v. Prouse, supra, this Court invalidated a search where an officer stopped vehicle on an apparent

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[15] See Soldal v. Cook County, 506 U.S. 56 (1992)(A property seizure will be more strictly scrutinized when it is tantamount to a seizure of the person.)

Here, Respondents agreed Petitioner herself was not detained and was free to go even if she was parked in a red zone. They also agreed that Respondent LOPEZ ordered her not to move the car, and that it was her moving the car (which he claims prevented him from gathering the necessary information) justified her arrest under Penal Code § 148. A-13. However, by seizing her car, as a matter of law she was also seized, as no reasonable person in such circumstances, let alone one with a large amount of luggage sitting on the sidewalk, would feel reasonably free to leave. Florida v. Bostick, 501 U.S. 429 (1991); United States v. Sharpe, 470 U.S. 675 (1985); United States v. Chan-Jiminez, 125 F.3d 1324 (9th Cir. 1997)

whim, finding the traffic stop was unreasonable under the Fourth Amendment because there was no reasonable suspicion that a criminal law had been violated. The officer testified that, prior to stopping the vehicle, he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration.

This Court found that this was an illegal seizure, holding that a police officer may not lawfully stop a car where there is neither probable cause nor reasonable suspicion to believe that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.

This Court stated:

> . . . We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.
>
> The question remains, however, whether, in the service of these important ends, the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. On the record before us, that question must be answered in the negative. Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway

safety of the random spot check justifies the practice under the Fourth Amendment.

Delaware v. Prouse, supra, 440 U.S. at 657.

accord United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)(except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.)

In Whren v. United States, supra, wherein this Court ruled that an officers subjective motivations are irrelevant to his decision to stop a vehicle so long as, objectively viewed, probable cause existed to stop the car to enforce traffic laws, this Court noted that "Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Colombia traffic code had been violated." Those provisions were "civil" in nature, that is, the violators were, as is the case here, only subject to a civil penalty and not criminal punishment. D.C. Municipal Code § 40-624.

However, unlike the Petitioners in Whren, Petitioner does not concede that "probable cause" existed as this Court has consistently defined the term. The offenses at issue in Whren, negligent operation of a motor vehicle, failure to signal when turning, and speeding, all involved the operation of an automobile on public streets, all took place in the midst of "traffic" and implicated the "safety" of other motorists, as permitted by Prouse.[16]

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[16] In Washington D.C., reckless driving (either in the form of speeding or the operation of the

In this instance, there were no facts to suggest that the safety of other motorists was implicated by the fact that Petitioner's car was standing in a rd zone. In fact, Officer Boyd was not hindered in his ability to drive past Petitioner's car, so no traffic concerns were implicated. Rather, this case is a "random" stop in the sense that there was no "probable cause," as defined by the "traditional common-law rule", to believe that traffic and vehicle safety regulations, contraband or evidence of a crime may be found within.

As such, Respondent LOPEZ could not lawfully direct Petitioner not to move the car, regardless of his purpose.[17]

b. Evidence of a Crime or Contraband

Absent probable cause or reasonable suspicion to believe there has been a violation of a "traffic or vehicle

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automobile in any other way), is a misdemeanor subject to criminal sanctions. D.C. Municipal Code § 40-712. In Whren, depending upon the manner of the operation fo the vehicle, Officer Soto could have had probable cause to believe a misdemeanor had been committed. The opinion is silent on the exact manner of the driving or whether the arresting officer ever considered such misdemeanor charges in light of the discovery of crack cocaine.

[17] Nor could he claim that the seizure was for purposes of inspection, given Respondents' concession that "The information Respondent LOPEZ was required to obtain by the Municipal/Vehicle Codes was visible, i.e., not obstructed from view." See A-18.

safety regulations", seizures of vehicles can be justified on the additional grounds.

A warrantless seizure is justified if the vehicle itself is contraband or subject to forfeiture. Florida v. White, 526 U.S. 559 (1999)

If there is probable cause or reasonable suspicion to believe a vehicle contains evidence of a crime or contraband, it can be seized without a warrant. United States v. Ross, 456 U.S. 798 (1982); California v. Acevedo, 500 U.S. 565 (1991); Wyoming v. Houghton, 526 U.S. 295 (1999); but see Knowles v. Iowa, 525 U.S. 113 (1998)(determining that there are limits to the authority of the police to conduct warrantless searches or seizure of automobiles, this Court held that a statute which permitted the search of a vehicle stopped for a speeding as "incident to arrest" violated the Fourth Amendment in that it purported to authorize a search in the absence of probable cause to believe evidence of a crime (specifically, the crime which justified the stop) would be located. Neither speculative concerns of "officer safety" nor a claimed "need to preserve evidence" were sufficient to render the statute constitutional.)

The instant case presents one more logical limitation on the reasonableness of a warrantless seizure of a vehicle.

3. None of the Limited Circumstances in Which Seizures under the Fourth Amendment Do Not Require Reasonable Suspicion or Probable Cause Apply to this Case.

a. Motorists

In Maryland v. Wilson, 519 U.S. 408, 415 fn.3 (1997), this Court extended the ruling in Pennsylvania v. Mimms, 434 U.S. 106, 111 fn.6 (1977), which allowed the police to order a lawfully detained motorist from his vehicle for purposes of officer safety to passengers, even absent

individualized suspicion to believe the passenger had violated the law.

However, this Court declined to consider whether a passenger could be thereafter prohibited from leaving.[18]

In this instance, Respondents never asserted "officer safety" justified the seizure of the vehicle. They expressly conceded that Petitioner herself was not being detained. A-18, item number 10.

b. Pervasively Regulated Industries

Administrative searches of pervasively regulated industries will be justified on the basis of fire, health or safety concerns. However, absent a warrant, exigent circumstances or consent is required. None of these factors applies here. See Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990)(warrant required in nuisance case); United States v. Bulacan, 156 F.3d 963, 967(9th Cir. 1998)(district court properly suppressed methamphetamine seized after warrantless search at federal building on grounds that regulation authorizing warrantless search violated Fourth Amendment.)

The fact that an automobile is heavily regulated justifies the lack of a warrant, but cannot justify the fact of the seizure itself. Delaware v. Prouse, supra, 440 U.S. at pages 662-663 ("An individual operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation."(footnote omitted)

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[18] In both cases, the motorists had been initially been stopped for criminal traffic violations (expired license plate and speeding.) In both, this Court was concerned with the state's heavy interest in officer safety.

See also Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1998)(rejecting argument that pervasive regulation surrounding automobiles justifies suspicionless detentions. "It is untenable to equate police DUI traffic stops with the pervasively regulated environment where special needs can justify even suspicionless drug testing)

c. Community Care Taking Function

In Cady v. Dombrowski, 413 U.S 433, 441-442 (1972), this Court, in discussing a "community care taking function" noted that "often, noncriminal contact with automobiles will bring local officials in plain view of evidence, fruits or instrumentalities of a crime or contraband." In this case, Respondent LOPEZ did not testify as to the plain view of evidence, fruits or instrumentalities of a crime or contraband

In South Dakota v. Opperman, 428 U.S. 364, 368-371 (1976), while upholding an inventory search of a vehicle, this Court noted that "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Here, there was no evidence or contention that Petitioner's car impeded traffic or threatened public safety and convenience. To the contrary, Officer Boyd was able to drive his vehicle without impediment. Moreover, the police departed the scene without impending Petitioner's car.

In People v. Ray, 21 Cal.4th . 464 (1999), the California Supreme Court noted that the "community care taking exception" implicates activities which do not involve "crime solving activities", but rather circumstances which "reduce the opportunities for the commission of crimes, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflicts, create and maintain a feeling of security, and provide other services on an emergency basis." None of those additional factors was

implicated herein.

d. Public Safety

In Skinner v. Railway Labor Executives Union, 489 U.S. 602 (1989) and National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989), this Court upheld drug testing of federal employees)[19]. Respondents never asserted below that public safety was at issue.

In Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990), relying upon a Terry balancing test, this Court held that temporary, fixed sobriety checkpoints do not violate the Fourth Amendment even though no particularized suspicion of criminal activity exists. This Court balanced the limited intrusion to the motorist, combined with the minimal potential for abuse of authority against the heavy state interest in eradicating drunk driving, which is a criminal offense in every state. This case only involves a revenue generating parking violation.

4. Prosecutions of Individuals May Be Prohibited If the Offense in Question Is Based upon the Exercise of Their Fourth Amendment Rights.

Petitioner asserts that in order for a violation of Penal Code § 148 and/or Vehicle Code § 2800 to have been committed, the actions which a citizen takes to obstruct or delay an officer cannot be constitutionally privileged. Otherwise, anyone who refuses to allow the police, upon

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[19] New Jersey v. T.L.O., 469 U.S. 709 (1987) involved searches of students by a school administrator, but this Court cautioned that the case did not address a search conducted by law enforcement.

request, to conduct a consensual search of their home, person, property or car could be arrested for obstructing or delaying an officer or refusing a lawful order.

In Lawson v. Kolender, 461 U.S. 352 (1983), this Court ruled that a California vagrancy statute requiring persons to provide reliable identification on request during Terry stops violated the Fourth Amendment.

In Brown v. Texas, 443 U.S. 47 (1979), this Court held that a statute requiring persons stopped by the police to identify themselves was unconstitutional as applied to a man who was stopped by officers who had no reasonable suspicion that the man was involved in a crime.

In Martinelli v. City of Beaumont, 820 F.2d 149 (9th Cir. 1987), a § 1983 action, the Ninth Circuit held that a failure to identify oneself to a police officer investigating hit and run accident cannot be punished under § 148 without violating the Fourth Amendment.

In Morgan v. Woessner, 975 F.2d 629 (9th Cir. 1992), the Ninth Circuit held that a plaintiff was entitled to judgment as a matter of law in a false arrest case when the evidence, according to the defendant' version of the facts, clearly indicated that the plaintiff did not want to be bothered by the officer. The officer insisted that the plaintiff was free to go and was not under arrest, but insisted that the plaintiff answer his question and demanded the plaintiff accompany him.

In People v. Wetzel, 11 Cal.3d 107 (1974), the California Supreme Court held that a defendant who stood in doorway of her apartment and refused to give consent to officers who requested permission to search for juvenile suspected of breaking window did not violate Penal Code § 148. The Court held that acts which constitute assertion of constitutional right cannot form the basis of criminal conduct. "Had she complied with the officers requests and stood back from the doorway this in itself would have, under the circumstances, constituted the consent which she

was not required to give."

See also People v. Quiroga 16 Cal.App.4th 961 (1993)(mere refusal to disclose personal information following an arrest for a misdemeanor or infraction cannot constitute resisting or delaying a peace officer.); United States v. Turner, 815 F.Supp. 1332 (N.D. Cal. 1993)(National Park Service Ranger noticed the defendant's car appeared to start moving as soon as the rangers vehicle came onto the scene. He yelled at the defendant to stop, but the defendant kept driving at a lawful rate of speed, rounded a building and met the officer's car coming the other way. Upon the officer's second command to stop, the defendant did, and the officer found evidence of criminal activity. The district court ruled that because the officer had no right to initially order the defendant to stop, he could not rely upon the defendant's failure to stop as grounds to justify the second stop. Accordingly, all the evidence was suppressed and the case dismissed.)

Most recently, this Court held in Illinois v. Wardlaw, ___ U.S. ___, 120 S.Ct. 673 (2000) that a person's unprovoked flight from a clearly identified police officer who was patrolling a high crime area could justify a temporary investigatory stop pursuant to the standards set forth in Terry v. Ohio, supra, 392 U.S. 1.

This Court stated:

> Such a holding is entirely consistent with our decision in Florida v. Royer, 460 U.S. 491 (1983), when we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. Id. at 498. And any "refusal to cooperate, without more, does not furnish the minimal level of objective

justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437 (1991).

In this instance, Petitioner was simply "going about her business" in loading her luggage into the trunk of her car, which was parked in a red zone. She had committed no crime, nor had she violated any traffic (as opposed to parking) or vehicle safety regulation. Her car was not contraband, did not contain any evidence, and was not subject to seizure under California Vehicle Code § 22651. (To the extent that Respondents may argue that it was subject to seizure, they did not present any evidence to support such a contention.[20])

As such, any actions taken by her which might be deemed delaying or obstructing the police, ignoring the police or refusing to cooperate could not constitutionally serve as the basis for a detention or arrest for a violation of Penal Code § 148 or Vehicle Code § 2800 without violating the Fourth Amendment.[21]

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[20] In fact, after she was arrested and transported from the scene, the police left it to her mother and coworkers to move the vehicle. RT I: 153; II: 167-168, 173; III: 94-95, 108.

[21] The only other actions articulated by Respondent LOPEZ at either the trial or his deposition was the tone of Petitioner's voice, telling Respondent LOPEZ he was wrong, protesting his actions or detention, or even yelling and screaming and cursing cannot constitute the basis for an arrest without violating the First Amendment. City of Houston v. Hill, 482 U.S. 451 (1987); Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990); MacKinney v.

In short, Petitioner's actions, under any construction and regardless of who is to be believed, was constitutionally privileged. Respondents did not contest the material facts leading to this conclusion. (A-17 through A-19, items nos. 3, 10, 11, 16, 18.) Any other facts are simply irrelevant to the inquiry.

Petitioner should therefore have been allowed to move her car without fear of any penalty. Her attempt to do so could not, as a matter of law, constitute obstructing or delaying an officer without violating the Fourth Amendment.

D. The Instant Case Involves an Important Federal Question That Has Not Been, but Should Be, Settled by this Court.

According to the California Department of Motor Vehicles there are some 20.7 million licensed drivers in the State of California. The County of San Diego alone has some 1.8 million licensed drivers in 1999. These drivers own some 17.9 million automobiles, 397.032 motorcycles, 5.7 million trucks, and 3 million trailers. see A-51 through A-56.

In accordance with California Vehicle Code

Nielsen, 69 F.3d 1002 (9th Cir. 1995)(all holding that the use of obscene gestures, and/or profanity and/or criticism directed toward a police officer is constitutionally protected lawful activity, and law enforcement officers may neither detain nor arrest a person who is engaged solely in such conduct.); People v. Robles, 48 Cal.App.4th Supp 1 (1996)("Penal Code § 148 does not apply solely to nonverbal conduct involving flight or forcible interference with an officer's activities") ; People v. Quiroga 16 Cal.App.4th 961 (1993)

40200.3(b), the City of San Diego has compiled information concerning the "number of cases processed and all sums received and distributed." (See Appendix A-57 through A-60)

The City of San Diego Parking Enforcement Bureau has reported that in fiscal year 1999 (July 1998 through July 1999) it issued 264,560 parking citations, and collected $10,924,226.37 in gross revenue and $10,835,058.05 in net revenue. It disbursed $2,756,716.56. (It is unknown if this disbursement was made to the Code Enforcement Civil Penalties Fund, as required by SDMC § 13.0402. Presumably, prior to their disbursement, the monies collected were deposited with the City Treasurer as required by Vehicle Code § 40200.4). It earned a surplus of $8,078,341.49, which was deemed "agency revenue."

After the City of San Diego Street Sweepers, the next largest revenue generator was the City of San Diego Police Department (not including the South Bay Division).[22] For fiscal year 1999 it issued 42,574 citations, and collected $2,289,271.25 in gross revenue and $2,264,345.25 in net revenue. It distributed $725,021.21 (It is also unknown if this disbursement was made to the Code Enforcement Civil Penalties Fund, as required by SDMC § 13.0402. Presumably, prior to their disbursement, the monies collected were also deposited with the City Treasurer as required by Vehicle Code § 40200.4.) It earned a surplus of $1,539,324.04, which was also deemed "agency revenue."

Under California Vehicle Code § 40202, each of these drivers is subject to arrest for violating California Penal Code § 148 if they should find themselves confronted by a

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[22] It should be noted that becasue the Police Department issues many types of citations, it cannot be determined how many were for non-criminal parking offenses.

police or parking enforcement officer desirous of issuing a citation which could be mailed to the registered owner of the vehicle.[23]

Given the sheer number of drivers and vehicle owners in the State of California and the enormous financial incentive for the CITY OF SAN DIEGO to issue parking citations, logic suggests that the consequences which befell Petitioner will repeat themselves[24] unless and until this

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[23] In the event the departure of the driver violates some other traffic law, such as speeding or reckless driving, Prouse would justify a warrantless detention.

[24] A parking enforcement officer is a "public officer" within the meaning of Penal Code § 148. Attempting to depart when a parking enforcement officer is attempting to gather information necessary to issue a parking citation is therefore punishable under Penal Code § 148.

Moreover, pursuant to the provisions of Penal Code § 836.5(d), "The governing body of a local agency, by ordinance, may authorize its officers and employees who have the duty to enforce a statute or ordinance to arrest persons for violations of the statute or ordinance as provided in subdivision (a)."

The City of San Diego has in fact done so, by enacting SDMC § 12.0105, which provides that:

"A director or any designated Enforcement Official is authorized to arrest without a warrant any person whenever the Enforcement Official has reasonable cause to believe that the person has committed a

Court declares such conduct unconstitutional.[25]

E. The Ruling of the Ninth Circuit Involves an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

In ths instance, the decision of the Court of Appeals failed to address the applicability of any of this Court's decisions on the detention and seizures of vehicles. Moreover, instead of requiring the State to justify its warrantless detention and seizure of Petitioner and her vehicle., (and consequent arrest of the Petitioner for attempting to exercise her Fourth Amendment rights), it

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violation of the Municipal Code or applicable state codes in his or her presence. Pursuant to Penal Code § 836.5 the Enforcement Official can only arrest a person by issuing a misdemeanor field citation."

Parking enforcement officers therefore can issue citations for violating Penal Code § 148.

[25] The current state of the law in the Ninth Circuit is that for purposes of a Fourth Amendment seizure, there is no constitutional difference between a custodial arrest and a notice to appear. Higbee v. City of San Diego, 911 F.2d 377 (9th Cir. 1990); Lopez v. City of Oxnard, 207 Cal.App.3d 1, 4 (1989)(an arrestee can not bring against policeman who should have issued notice to appear, but instead conducted full custodial arrest) but see Hewitt v. Helms, 459 U.S. 460, 472 (1983); Collins v. Jordan, 110 F.3d 1363, 1375-1376 (9th Cir. 1996)(use of mandatory statutory language creates actionable due process claim)

placed the burden on her to explain why her conduct was privileged, holding that she failed to do so.

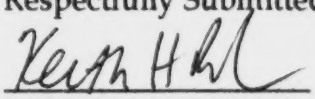
Such a decision requires the intervention of this Court.

F. Conclusion

For all of the foregoing reasons, ALMA ROMERO asks this Honorable Court to grant review in this case.

DATED: May 10, 2000

Respectfully Submitted,



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